

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

JAMES E. WRIGHT,

Plaintiff,

vs.

BNSF RAILWAY COMPANY,

Defendant.

Case No.13-CV-24-JED-FHM

OPINION AND ORDER

Defendant's Rule 35 Motion for Physical Examination, [Dkt. 95] is before the undersigned United States Magistrate Judge for decision. The matter has been fully briefed.

Defendant seeks an order requiring Plaintiff to present himself for a physical examination to be conducted pursuant to Fed.R.Civ.P. 35. Defendant proposes that a functional capacity examination (FCE) be performed by licensed physical therapist Lai Ann Simmons at Select Physical Therapy, 11055 S. Memorial Drive, Tulsa, Ok. 74133. Plaintiff objects to the examination on the basis that Defendant has not disclosed the qualifications, licensure or certifications of the chosen physical therapist. Plaintiff also maintains that Defendant has not demonstrated good cause for the examination, contending that reports by Dr. Conner, an orthopedic surgeon selected by Defendant and depositions of physicians who have treated Plaintiff's neck and back injuries provide sufficient information. In addition, Plaintiff argues that the FCE should be refused because Defendant has refused to accommodate physical restrictions his shoulder surgeon, Dr. Orjala, has imposed including, limited above shoulder work, not lifting over 40 pounds with his left arm, limited repetitive lifting with his left arm, and no swinging a sledge hammer or other heavy tools.

Defendant states good cause for the FCE is demonstrated by the deposition testimony of Plaintiff's own treating physician, Dr. Schoedinger. Dr. Schoedinger testified that he could not render an opinion as to Plaintiff's ability to engage in gainful employment without an FCE. Dr. Schoedinger testified that he routinely sends patients for an FCE conducted by a physical therapist. Further Defendant asserts that Dr. Conner questioned Plaintiff's range of motion, stating that the range of motion is out of proportion with x-ray findings. The court finds that the testimony of Dr. Schoedinger and the question expressed by Dr. Conner about Plaintiff's range of motion establish good cause for the FCE.

Defendant has submitted an exhibit showing that Lai Ann Simmons is a licensed physical therapist, originally licensed in 1989, against whom no disciplinary action has been taken. [Dkt. 98-2]. The court is satisfied that Lai Ann Simmons is suitably licensed to conduct the proposed examination.

The parties have presented no information as to whether the FCE will or will not involve any activity in excess of Plaintiff's shoulder restrictions. However, it is reasonable for Plaintiff to provide Lai Ann Simmons with a copy of Dr. Orjala's restrictions and for the FCE to be conducted taking those restrictions into account.

Based on the foregoing, Defendant's Rule 35 Motion for Physical Examination, [Dkt. 95], is GRANTED.

Plaintiff is hereby ordered to appear at a mutually agreeable time and date at the office of Lai Ann Simmons, P.T. at Select Physical Therapy, 11055 S. Memorial Drive, Tulsa, Oklahoma 74133 and to cooperate in the performance of a functional capacity examination.

SO ORDERED this 23rd day of July, 2015.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE